

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
BEVERLY ADKINS, et al, : 12-CV-07667 (VEC)  
:  
Plaintiffs, :  
v. :  
: 500 Pearl Street  
MORGAN STANLEY, et al, : New York, New York  
:  
Defendants. : May 12, 2014  
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TRANSCRIPT OF CIVIL CAUSE FOR HEARING  
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 I did have some questions but it was the defendants  
2 went well beyond my order in their letter today, so I don't  
3 know if plaintiffs wanted to address anything in there. I know  
4 you had about two hours to look at it, but there was some new  
5 material in there. Anything you wanted to add?

6 MS. GOODMAN: Your Honor, plaintiffs would seek an  
7 opportunity for an additional written submission that responds  
8 to some of the cases that were introduced in defendant's letter  
9 today, Your Honor.

10 THE COURT: I almost would want to strike the letter  
11 except that I'd rather decide it based upon a proper record. I  
12 may still decide this, we'll see, while I have everyone here.

13 I just want to get a better sense from each side  
14 starting with defendants what the relationship was between  
15 Morgan Stanley and the actual people deposed at the time and  
16 now and whether that matters. No one's raised it, but I was  
17 just curious. I assume they were all certainly employees then  
18 but maybe some details might be of interest to me. So Mr.  
19 Ogden, go ahead.

20 MR. OGDEN: Yes, Your Honor. All of them are either  
21 former or current employees.

22 THE COURT: Now or then?

23 MR. OGDEN: Both. The status I'm just looking at,  
24 information I have, it looks to me like the status of one of  
25 the -- there are ten of the 18 document custodians that have

1 agency might say as it did --

2 THE COURT: Oh, I could have easily imagined the  
3 statute where they said we're never going to give it to you,  
4 but that's not the statute they wrote. They said we're not  
5 going to give it to you unless you consent.

6 MR. OGDEN: But it doesn't say that they will give it  
7 to you if you do consent, and the reason for that is that they  
8 want to maintain control, and they do have control, and they  
9 have exercised control so that if a party consents, or if a  
10 party even asks for a copy of the transcript, they may well say  
11 no, and they're not obligated to provide it. If the party  
12 consents, they may, but it's up to them. And here -- and  
13 that's the critical thing. So the cases that you have in which  
14 investigative agencies have been held to be within the control  
15 of a private entity have been cases where that party had an  
16 expressed right to obtain the material. This idea of practical  
17 ability --

18 THE COURT: Okay. And why don't you turn to that  
19 then because it's a different concept.

20 MR. OGDEN: It is a different concept. It's another  
21 route to the idea of control. And first of all, it has never  
22 been applied to a circumstance in which a private party is said  
23 to have quote the practical ability to obtain something from a  
24 government agency of which I'm aware absent a right to obtain  
25 the material, number one. Number two, the reason for that is

1 that what practical ability rests on in the case law is on a  
2 relationship between the party from whom the materials are  
3 being requested and the party in possession pursuant to which  
4 the party effectively has the ability to mandate production  
5 even if that party doesn't want to produce it. So that, for  
6 example, you have that power over your attorney even though  
7 there may not be an expressed obligation. You have that power  
8 over your agent, maybe over your possessor of your email  
9 messages who you contract with to keep those email messages for  
10 you over a subsidiary of a corporation. In all those  
11 situations, the party from whom the documents are being  
12 requested may not have a formal right but it has the practical  
13 ability not only to say something about it, but to cause that  
14 entity to produce the document. That's what practical ability  
15 means. That just isn't true here.

16 THE COURT: Well, they have the practical ability to  
17 cause the AG to produce this document.

18 MR. OGDEN: No, Your Honor. They have the practical  
19 ability to permit the AG to do so, but the AG will do so only  
20 if the AG for its own reasons, having nothing to do with  
21 whether Morgan Stanley desires it, decides to do it. And the -  
22 -

23 THE COURT: Okay. Well, if they don't decide to do  
24 it, maybe you come back and say you know what, Judge, you  
25 thought I had the practical ability but boy were you wrong,

1 would like to consider those transcripts individually, we would  
2 ask that that to happen subsequent to today that we have an  
3 opportunity to prepare specifically.

4 THE COURT: I think I don't want a lot of paper  
5 wasted but I don't want to sit and read a transcript, so I  
6 think what you need to do is pick out the important things in  
7 whatever transcript. I mean it's not so much the number of  
8 times someone says I don't remember as whether there are  
9 important pieces of your case that they're not remembering,  
10 important pieces of factual investigation that they're not  
11 remembering.

12 MS. GOODMAN: And Your Honor, we're happy to do that  
13 but we would ask that this Court come up with a timeline that  
14 we can do that in an expedited way because we've been seeking  
15 these transcripts from defendants since February and we now  
16 have a class certification motion that's due on June 8<sup>th</sup> in less  
17 than a month.

18 THE COURT: Right.

19 MS. GOODMAN: So and we really --

20 THE COURT: No, I think we should do it quickly.  
21 Well, the burden is kind of on you because I'm going to make  
22 you go first, so whenever you want to do it is fine with me.

23 MS. GOODMAN: Okay.

24 THE COURT: Whatever time you ask for I shall give to  
25 your neighbor, so --

1 MS. GOODMAN: Your Honor, we could submit something  
2 by the close of business on Wednesday. The other thing we can  
3 do, Your Honor, is confer and propose a timeline by the end of  
4 today.

5 THE COURT: That's fine. So if this is going to be  
6 limited to this issue of why you -- the big issue is why you  
7 need the transcripts. The only one I believe you've identified  
8 is memory loss. That's the only reason you need them. So I  
9 need to have a complete picture of that with respect to each  
10 witness to know whether there should be some wholesale,  
11 assuming again I reach the issue, whether there should be some  
12 wholesale production or whether it should be limited to  
13 particular people.

14 MS. GOODMAN: And Your Honor, can plaintiffs also  
15 address the arguments raised in defendant's letter?

16 THE COURT: The new arguments? Sure. Feel free.  
17 Only the new ones.

18 MS. GOODMAN: Thank you.

19 THE COURT: All right. So I'll just wait to hear  
20 from you.

21 MS. GOODMAN: We'll supply something in writing for  
22 that.

23 THE COURT: Anything you wanted to add?

24 MR. OGDEN: Just one thing, Your Honor, on my  
25 continuing effort to suggest to you that while I think you're

1 I certify that the foregoing is a court transcript from an  
2 electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Mary Greco

7 Dated: June 24, 2014  
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